MURUGAN PALANISAMY & ORS *a*

v.

DEPUTY MINISTER OF HOME AFFAIRS & ORS

HIGH COURT MALAYA, TAIPING *b*
ZULKEFLI MAKINUDIN J
[CRIMINAL APPLICATIONS NOS: 44-34-1998, 44-35-1998
& 44-36-1998]
25 JULY 1999

CRIMINAL PROCEDURE: *Habeas corpus - Preventive detention - Grounds for making order - Whether Minister made error - Whether criminal process more appropriate - Emergency (Public Order and Prevention of Crime) Ordinance 1969, s. 4(1)* *c*

PREVENTIVE DETENTION: *Detention - Whether lawful - Grounds for making order - Whether Minister made error - Whether criminal process more appropriate - Emergency (Public Order and Prevention of Crime) Ordinance 1969, s. 4(1)* *d*

The applicants had been detained under detention orders issued by the first respondent ('the Minister') under s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance'). As the issue involving all three applicants was the same, it was agreed that the other two applicants would be bound by the decision of the court in the first application. *e*

The allegation against the first applicant was that he had committed armed robbery at a petrol station on 8 September 1997. The applicant applied for a writ of *habeas corpus*, challenging the validity of the order on the grounds that the Minister had: (i) failed to apply his mind properly and correctly to the appropriate limb of s. 4(1) when issuing the order; and (ii) failed to consider the possibility of instituting a criminal prosecution for the applicant's alleged offence under the Penal Code. *f* *g*

Held:

[1] As s. 4(1) of the Ordinance contains two separate and distinct limbs defining the grounds upon which the Minister can make a detention order, the Minister must exercise his powers by invoking the correct limb. The affidavits and exhibits showed that there was uncertainty as to whether he had invoked the first limb or the second limb, thereby showing that he had acted mechanically and arbitrarily. Where there was doubt with respect thereto, the benefit must be given to the applicant. *h* *i*

[2] Furthermore, the applicant's right under art. 151 of the Federal Constitution to challenge the order before the Advisory Board would be prejudiced by the lack of certainty as to which limb of s. 4(1) he had been detained under.

[3] The ordinary criminal process is not to be circumvented by ready resort to preventive detention. The failure of the detaining authority to consider a criminal prosecution may lead to the conclusion that it has not applied its mind to the vital question whether it is necessary to preventively detain a person. In the circumstances, it could even be said that there was *mala fides* on the part of the detaining authority in ordering the applicant's detention.

[Applications allowed.]

Case(s) referred to:

Hemlata v. State of Maharashtra AIR [1982] SC 8 ***(foll)***

Menteri Hal Ehwal Dalam Negeri & Anor v. Lee Gee Lam & Anor [1993] 4 CLJ 336 ***(foll)***

Legislation referred to:

Emergency (Public Order and Prevention of Crime) Ordinance 1969, ss. 4(1), 7C, 7D

Federal Constitution, art. 151(1)

For the applicants - MM Athimulan; M/s Athimulan & Co
For the respondents - Kamaludin Md Said SFC

Reported by Anne Khoo

JUDGMENT

Zulkefli Makinudin J:

The applicant, Murugan s/o Palanisamy had been ordered by the Deputy Minister of Home Affairs ("Deputy Minister") to be detained for a period of two years under a detention order dated 27 November 1997 issued under s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ("The Ordinance"). As a result of the said detention order the applicant filed this application for a writ of *habeas corpus* to be issued against the named respondents and for the applicant to be released forthwith. On the day fixed for the hearing of this application, there are two other similar applications to be heard on the same day involving two other applicants who had also been ordered by the Deputy Minister to be detained accordingly under the said s. 4(1) of the Ordinance. As the issues to be raised and the grounds to be relied by all the three applicants are almost similar, both the learned counsel for the three applicants and the learned senior federal counsel for the respondents agreed at the outset that in the event this court allows or dimisses the

application under Criminal Application No. 44-34-48 by the applicant Murugan s/o Palanisamy, the decision given by this court shall be binding on both the other two applicants in Criminal Application Nos. 44-35-87 and 44-36-98 respectively.

Encik Athimulan, the learned counsel for the applicant in his submission before me advanced a number of grounds to show that the said detention order issued to the applicant was bad in law. Having noted the limited and restrictive powers of the court to exercise its powers of judicial review in respect of the act or decision of the Minister of Home Affairs by virtue of the provision of ss. 7C and 7D of the Ordinance save in regard to any question on his due compliance with any procedural requirement of the ordinance governing such act or decision, I find that there are only to main grounds that merit consideration as follows:

(i) whether by reference to the affidavit in reply of the Deputy Minister filed in opposing the application of the applicant for a writ of *habeas corpus* it is shown that he had failed to apply his mind properly and correctly the appropriate limb of s. 4(1) of the Ordinance when issuing the said detention order.

(2) whether by reference to the said affidavit in reply of the Deputy Minister it is shown that there has been a failure by him as a detaining authority in the circumstances of the case to consider and state the possibility of launching a criminal prosecution against the applicant when the applicant is alleged to have committed only one known offence under the Penal Code.

Having perused the affidavits and the relevant exhibits filed therein on behalf of the applicant and the respondents and having heard the submission of learned counsel for the applicant and the learned senior federal counsel for the respondent, I find as a fact that there has been a non-compliance with the procedural requirement of the ordinance in the issuance of the said detention order by the Deputy Minister. I am of the view by reference to the said affidavit of the Deputy Minister he had failed to address his mind properly and correctly the appropriate limb of s. 4(1) of the Ordinance in issuing the said detention order. Section 4(1) of the Ordinance contained two separate and distinct limbs worded as follows:

> If the Minister is satisfied that with a view to preventing any person from acting in any manner prejudicial to public order it is necessary that the person should be detained or that it is necessary for the suppression of violence or the prevention of crimes involving violence that the person should be detained, the Minister shall make an order directing that the person be detained for any period not exceeding two years.

The view that there are two separate and distinct limbs under s. 4(1) of the Ordinance which spelt out the scope of powers of the Deputy Minister to issue a detention order has been affirmed by the Supreme Court in the case of *Menteri Hal Ehwal Dalam Negeri & Anor v. Lee Gee Lam & Anor.* [1993] 4 CLJ 336; [1993] 3 MLJ 673. His lordship LC Vohrah J in delivering the judgment of the Supreme Court on this point in the above mentioned case had stated *inter alia* at p. 678 as follows:

> We would conclude by saying that in determining the propriety or legality of a detention order under section 4(1), the satisfaction of the Minister has to be considered in the light of the limbs under which he acted. The determination of the question as to whether he addressed his mind to the relevant limb or for that matter to both the limbs in making his detention order is a procedural matter and if it is shown that there is some doubt as to which particular limb the Minister applied his mind to or whether to both the limbs together in grounding his order, the benefit of the doubt must be given to the detenu.

The question posed before this court is how then would the satisfaction of the Deputy Minister in issuing the said detention order be tested and considered to determine whether he had addressed his mind properly and correctly to the relevant limb of the provision of s. 4(1) of the Ordinance. Encik Athimulan, the learned counsel for the applicant in his submission on this point invited the court to peruse the affidavit in reply of the Deputy Minister in opposing the application of the applicant for a writ of *habeas corpus* in particular to para. 6 of the said affidavit which states as follows:

> Setelah meneliti keseluruhan laporan lengkap berkenaan dengan kegiatan pemohon, saya berpuashati bahawa tahanan keatas pemohon adalah perlu untuk menghalang beliau daripada bertindak dengan apa cara sekalipun yang boleh memudaratkan kepada ketenteraman awam. Seterusnya saya telah membuat satu perintah yang mengarahkan supaya pemohon ditahan bagi tempoh dua tahun mulai 27-11-1997. Satu salinan Perintah Tahanan telah disahkan oleh Puan Zabidah bte Safar, seorang pegawai Kementerian Dalam Negeri yang mempunyai di dalam jagaannya dokumen tersebut dan dilampirkan sebagai ekshibit "MTRMG-1."

It is my finding that by reference to the said para 6 of the affidavit of the Deputy Minister it is clear that he had exercised his powers by using the first limb of the provision of s. 4(1) of the Ordinance to detain the applicant on the ground of preventing the applicant from acting in any manner prejudicial to public order. However by reference to the said detention order as exhibited in the said exh. "MTRMG-1" it is shown that the Deputy Minister in issuing the said detention order had invoked the second limb of the provision of s. 4(1) of the Ordinance in that the applicant had been detained to prevent him from committing a crime involving violence. This fact is further supported by the grounds upon which the said detention order was made that was attached to the detention order and served on the applicant reproduced as follows:

ALASAN-ALASAN YANG ATASNYA PERINTAH ITU DIBUAT: *a*

Kamu adalah seorang Ketua Kumpulan penjenayah yang telah melakukan kegiatan jenayah yang melibatkan kekerasan.

As the enabling powers of the Deputy Minister to detain a person under the said s. 4(1) of the Ordinance are contained in two separate and distinct limbs, *b* I am of the view that the Deputy Minister must be seen to be exercising his powers by invoking the correct limb in issuing the said detention order. A failure to do so would lead to a conclusion that he had acted mechanically and arbitrarily. Clearly it is noted in the circumstances of this case that there is a doubt as to whether the Deputy Minister had addressed his mind to the *c* relevant limb or for that matter to both the limbs in making his detention order. The satisfaction of the Minister has to be considered in the light of the limbs under which he acted. If there is some doubt as to which particular limb the Deputy Minister applied his mind to, then the benefit of the doubt must be given to the detenu, the appellant. *d*

Senior Federal Counsel Encik Kamaludin, appearing for the respondents submitted that the Deputy Minister in his affidavit had stated that he had studied as a whole the comprehensive report relating to the activities of the applicant submitted by the police to him and this means that a reference to "public order" by him in his affidavit covers all aspect of public order *e* including crime involving violence. Hence it was further submitted that the detention order issued by the Deputy Minister was within his scope of powers vested in him under s. 4(1) of the Ordinance. With respect I could not agree with the contention of the learned senior federal counsel on the point that a reference to the words "public order" by the Deputy Minister would cover *f* crime involving violence taking into consideration of the fact that the provision of s. 4(1) of the Ordinance contained two separate and distinct limbs. I am further of the view that the satisfaction of the Deputy Minister in detaining the applicant under any of the said two limbs of s. 4(1) of the ordinance must be clearly and unequivocally expressed in view of the fact that the applicant *g* as a detainee has a right of representation as provided under art. 151 of the Federal Constitution. Article 151(1) of the Federal Constitution states as follows:

(1) Where any law or ordinance made or promulgated in pursuance of this Part provides for preventive detention: *h*

(a) the authority on whose order any person is detained under that law or ordinance shall, as soon as may be, inform him of the grounds for his detention and, subject to clause (3) the allegations of fact on which the order is based, and shall give him the opportunity of making representations against the order as soon as may be; *i*

(b) no citizen shall continue to be detained under that law or ordinance unless an Advisory Board constituted as mentioned in clause (2) has considered any representations made by him under paragraph (a) and make recommendations thereon to the Yang di-Pertuan Agong within three months of receiving such representations or within such longer period as the Yang di-Pertuan Agong may allow.

Therefore before the Advisory Board the applicant as a detainee has the rights of representation to challenge or to oppose the grounds of his detention. It therefore follows that it would be highly prejudicial to the applicant as a detainee to present his case before the Advisory Board when the applicant does not know with certainty under which limb of s. 4(1) of the Ordinance he has been detained in view of the fact that there is some doubt as to which particular limb the Deputy Minister had applied his mind in grounding his order of detention on the applicant.

My second ground in allowing the application of the applicant for a writ of *habeas corpus* is pivoted on the argument that the Deputy Minister in his affidavit has failed to consider and state why there should not be a criminal prosecution instituted against the applicant bearing in mind that there is only one offence involved and this offence falls squarely within a prescribed offence of armed robbery under the Penal Code. The allegation of facts against the applicant that were attached to the said detention order contained only one charge reproduced as follows:

1. Bahawa kamu pada 8-9-1997, lebih kurang jam 9.25 pagi bertempat di stesyen minyak Shell, Gaya service, No. Lot 109 & 1254, Seksyen 5, Jalan Chain Ferry, Butterworth, Pulau Pinang bersama-sama dengan rakan kamu dengan bersenjatakan sepucuk pistol telah menyamun wang tunai dari stesyen minyak tersebut. Sebanyak RM20,000 telah berjaya disamun dari kejadian tersebut.

I am of the view that the ordinary criminal process is not to be circumvented or short circuited by ready resort to preventive detention. It is accepted that in some cases it may not be possible to bring the offender to book on account that witnesses do not come forward to depose against him out of fear or it may not be possible to collect all the necessary evidence without unreasonable delay and expenditure to prove the guilt of the offender beyond reasonable doubt. However, the failure of the detaining authority to consider and state the possibility of launching a criminal prosecution may, in the circumstances of the case lead to a conclusion that the detaining authority had not applied his mind to the vital question whether it was necessary to make such an order when an ordinary criminal prosecution could well serve the purpose. I am of the view that if the detaining authority fails to satisfy the court that the detaining authority so bore the said question in mind, the court would be

justified in drawing the inference that there was no application of the mind of the detaining authority to the vital question whether it was necessary to preventively detain the detenu. I find support of this argument by reference to the case of *Hemlata v. State of Maharashtra,* AIR [1982] SC 8 wherein in that that case it was held *inter alia* that the aspect relating to possibility of criminal prosecution must also be borne in mind while ordering detention. I would also venture to state in the circumstances of this case and bearing in mind there is only one allegation of fact relating to the one offence alleged to have committed by the applicant could lead to an inference that there was *mala fide* on the part of the detaining authority in ordering the detention of the applicant.

For the above stated reasons I would allow the application for a writ of *habeas corpus* by all the three applicants on the ground that the detention orders issued by the Deputy Minister for their detention were defective due to non compliance of the provision of s. 4(1) of the Ordinance.